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No. 96-152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RUDOLPH W. GIULIANI,
as Mayor of the City of New York, *et al.*,

Petitioners,

vs.

HAROLD YOURMAN, *et al., etc.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should *certiorari* be granted where the opinion of the Court of Appeals is not in conflict with any opinion of this Court, and is not in conflict with any of the opinions of a sister court of appeals?

2. Should *certiorari* be granted where the factual pattern of this case is significantly different from the facts of *Auer v. Robbins* in which this Court has granted *certiorari* (No. 95-897)?

3. Should *certiorari* be granted to determine if the DOL salary basis test regulation, promulgated after rule-making procedures in accordance with the Administrative Procedure Act, is entitled to *Chevron* deference?

4. Should *certiorari* be granted to determine if the Tenth Amendment is violated simply because the remaining portions of the salary basis test require public employers, like private employers, to make no deductions from salaries of exempt employees in any week in which they perform any work without regard to the number of days worked?

5. Should *certiorari* be granted to determine if an employer may claim an exemption from the provisions of the FLSA, where the employer has an express policy permitting reductions in pay for otherwise exempt employees for disciplinary infractions, court attendance and military leave and has even confirmed such policy by making actual deductions?

ADDITIONAL STATUTORY PROVISIONS

In addition to the statutory and regulatory provisions set forth in the Petition, the following sections of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201, *et seq.* are relevant:

Sec. 203. Definitions

As used in this chapter -

* * *

(d) "Employer" includes . . . a public agency . . .

* * *

(x) "Public agency" means . . . the government of a state or political subdivision thereof . . .

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STATEMENT OF THE CASE

The Findings of the District Court

The City's[1] statement of the case is misleading in a number of ways. Most important, contrary to the City's assertions,

[1] For clarity, petitioners (the Mayor of the City of New York, the New York City Board of Education and the New York City Health and Hospitals Corporation) will be referred to collectively as "the City", or where

(Footnote continued)

(Pet. 10-15)[2], the issue of part-day docking is not before this Court. This case was originally brought because the City was violating four distinct provisions of the "salary basis" test, 29 C.F.R. §541.118(a) - part-day docking, disciplinary penalties, court attendance and military leave - by subjecting employees to deductions from their salaries in weeks that they performed work. The plaintiffs thus could not qualify for the FLSA exemption otherwise available for white-collar employees. Plaintiffs did not sue simply on the part-day docking component; nor were the District Court's rulings only on that issue[3] (Pet. 14). The District Court specifically refrained from relying on the City's failure to comply with the part-day docking component, relying instead on the City's deviations from the test in connection with disciplinary penalties, court attendance and military leave (A 17-19).[4]

Although the District Court found a "plain inconsistency" between the City's time and leave regulations and the DOL's definition of "salary basis" (A 16), the District Court did "not rely upon defendants' part-day docking of pay in order to disqualify plaintiffs from the exemption", since the promulgation of 29 C.F.R. §541.5d had eliminated the part-day docking component after September, 1991 (A 17). Moreover, the District Court found that if it were to rely only on part-day docking, such finding would not shield the City from all liability since it would be sufficient to disqualify the employees from the exemption for the period prior to the promulgation

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appropriate, "the defendants." Respondents will be referred to as "the employees" or "the plaintiffs" as the context requires.

[2] Pet. followed by a number refers to pages in the Petition.

[3] We refer extensively to the opinion of the District Court (A 8-37) because the Court of Appeals affirmed on the opinions of the District Court (A 7).

[4] "A" followed by a number refers to pages in the appendix to the Petition. "JA" refers to pages in the Joint Appendix. "SA" refers to pages in the supplemental appendix. "RA" refers to pages in the respondents' appendix which are annexed to this brief.

of §541.5d. However, as the District Court found "plaintiffs not to be paid on a salary basis regardless of the part-day docking, dissection of plaintiffs' claims over time in relation to the promulgation of §542.5d" was unnecessary (A 17, fn. 8).

As to the City's policies on disciplinary penalties the District Court stated that "[a] more direct variance by defendants from the DOL regulations defining 'salary basis' is difficult to fathom." (A 18). The City admits and the District Court found that plaintiffs were "subject to disciplinary penalties, including suspensions without pay of one to four days ... for infractions other than those of safety rules of major significance. Defs. Admis. No. 8." (Pet. 15, A 12, JA 223). Those infractions include insubordination, abuse of sick leave, refusal to report for drug testing, conduct unbecoming, theft of agency property, and misuse of an agency car (A 12-13).

Although defendants formally admitted that they had actually imposed such penalties "on extremely rare occasions" (JA 224), discovery involving discipline of managers in three New York City agencies showed 14 instances of disciplinary actions against managers, five of which involved fines or suspensions (JA 243-52). In the District Court defendants argued that only two pay deductions had taken place, one for disciplinary reasons and the other in connection with military leave (A 13-14). The District Court found it unnecessary to decide the precise number of actual deductions because "the Court's holding does not depend upon the occurrence of any actual deductions in compensation." (A 14).

The District Court also found that the City's time and leave policies subjected the employees to deductions if they attended court proceedings in which the employee or a relative had a personal interest and if they took more than 22 work days for military leave.[5] The District Court found that both of

[5] There is no conflict among the circuit courts over the court attendance and military leave components of the salary basis test. Nor does the City make a persuasive case that these provisions make the salary basis test

(Footnote continued)

these policies directly conflict with the DOL regulations and concluded that "[t]he manifest discrepancies between the defendants' time and leave regulations and the DOL's definition of 'salary basis' in regard to penalties and absences for attendance at court proceedings or due to military leave prevent defendants from meeting their burden regarding the exemption under § 213(a)(1)." (A 19).

The City's Statement of the Case (Pet. 11) is also misleading in its representation of the DOL's position as to the other facets of the salary basis test. DOL's January, 1987 nonenforcement policy (A 41-42) only refers to nonenforcement of the part-day docking provision of the salary basis test. It specifically states that DOL will not deny an exemption to an *otherwise exempt* public employee whose pay is reduced because of absences of less than a day. It makes no reference to employees whose pay is reduced because of disciplinary infractions, military leave or court attendance and subsequent letter rulings make clear that exemptions would be lost if deductions were made for those reasons (A 48, 51-2, JA 357, RA 4-6).

Having found that the defendants' policies were inconsistent with the regulations of the DOL, the District Court addressed the issue of whether actual deductions from pay are needed for an employer to lose the white collar exemption or whether the fact that its employees are "subject to" such reductions is enough. Defendants argued there, as they do here, that such reductions must be regular and recurring in order to remove employees from the exemption. After a thorough review of the case law in this area, the District Court found that actual deductions were unnecessary because:

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irrational or that they violate public accountability. (Pet. 21-22) Certainly if public accountability is not implicated where the City grants 22 days of military leave as it does here, the fact that a few more days of paid military leave might be required because the employee is called up for service during a week in which he performs work does not make the DOL rule irrational.

• "Subject to reduction" when plainly read does not require actuality but intimates possibility and susceptibility and begs only the question of whether a policy exists under which a deduction may occur. (A 21-22)

• Unambiguous material generated by DOL seems to recognize that actual deductions are unnecessary before the exemption is lost. (A 22)

• The Second Circuit, in *Martin v. Malcolm Pirnie*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 113 S.Ct. 298 (1992), had unmistakably embraced the reasoning contained in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991). (A 22)

• There is no basis for distinguishing the proper interpretation of "subject to reduction" depending on whether the case involves §541.118(a)(2)-(3) or (4)-(5).[6] (A 22)

• The new §541.5d did not overrule the interpretation of "subject to reduction" contained in *Abshire* and *Martin*. (A 23)

• Exemptions under the FLSA must be construed strictly. (A 23)

The City's 1993 Rule Changes

In September and October, 1993, following the District Court's finding that defendants were not exempt under the FLSA because of the discrepancies in their time and leave and disciplinary policies, defendants amended their rules to conform to the requirements of the salary basis test.[7] The memorandum, from the New York City Personnel Director to

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[6] Sections 541.118(a)(2)-(3) relate to part-day docking; §§(a)(4) and (5) relate to court attendance, military leave and disciplinary penalties. See Pet. 8-9 for complete salary basis test.

[7] The City's changes are appended to this brief at RA-1 to 3. The New York City Board of Education and New York Health and Hospitals Corporation made similar changes. (SA 1834-39)

agency heads, stated that the changes in regulations and policies affecting civilian and uniformed managers were being made "so that the City will be in conformance with the requirements for exemption from the overtime provisions of the Fair Labor Standards Act" as set forth by the District Court in this case. (RA 1) The changes provided that:

• Docking of pay or leave and suspension without pay and fines were prohibited, except for infractions of safety rules of major significance.

• Pay-docking in connection with a 30-day suspension while disciplinary charges were pending was prohibited.

• Docking of pay for temporary military leave was prohibited.

• Docking of pay for attendance as a witness was prohibited.

• Unexcused tardiness was required to be charged first to annual leave balances before docking pay.

Similar changes were made by the other two defendants. Although the first two changes were unnecessarily broad, going well beyond the §541.118(a) requirements that an exempt employee's pay not be reduced "in any week in which he performs any work", defendants are unable to point to any incidence in which the new changes have interfered with their ability to properly manage and discipline their employees.[8] Indeed, they continue to maintain that discipline of otherwise exempt employees is very rare (Pet. 35).

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[8] Defendants had an opportunity to point to any such incident when they made their post-judgment motion for rehearing almost two years following the change in rules (A 35-37).

REASONS FOR DENYING THE WRIT

I

THIS CASE DOES NOT PRESENT AN ISSUE OF NATIONAL IMPORTANCE

The City has not demonstrated that the issues raised in the Petition are of such national importance that the Court must step in to resolve them. The revised salary test, i.e. §541.118(a) as modified by §541.5d, has cured any perceived deficiencies. Further clarifications or changes, if any, should be left to the administrative rulemaking process after notice and comment, or to Congress. *See*, *Cook v. Hudson*, 429 U.S. 165 (1976); *Sanks v. Georgia* 401, U.S. 144, 151 (1971) "...[I]t has always been a matter of fundamental principle with this Court...[to] exercise [its] powers of judicial review only as a matter of necessity." (holding that an intervening change in the statute eliminated the need for the Court to decide the issue because it was unlikely that the issue would arise again, at least in the same context.)

The fact that the City is liable for paying a large money judgment is not a sufficient reason for this Court to grant the Writ (Pet. 17)[9]. If paying overtime pay in compliance with the law costs public employers a substantial amount of money because more white-collar employees than expected are covered by the overtime provisions of the FLSA, the employers need only change their rules to fit into the requirements of the salary basis test. The many public employers, including the City of New York, that have changed their disciplinary and other policies without adverse consequences and are now able to lawfully claim the exemption attests to the ease with which

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[9] Although the City claims the judgment is now over $14 million, the actual back overtime pay award is approximately $6½ million which was doubled by the District Court's award of liquidated damages pursuant to FLSA § 216(b), based on the City's failure to show that its actions were "objectively reasonable". *Yourman v. Dinkins*, 865 F.Supp. 154, 163 (S.D.N.Y 1994).

liability can be avoided.[10] If the changes in policies are really so distasteful as the City claims, the public employers can continue to seek legislative amendments to the FLSA or more changes in the DOL Rules. As discussed more fully in the section under the Tenth Amendment, the political process has worked well for the City by relieving it of continuing liability for part-day docking. What the City really wants is simply to be relieved of the liability it incurred while violating explicit provisions of the FLSA and the Rules. That is not a reason for granting a Writ.

The City also seeks to have the salary basis test declared invalid as applied to the public sector. But any determination of invalidity would relate only to the period prior to September 1991, the period prior to the DOL's amendment of the salary basis test that eliminated part-day docking as one of the criteria for determining exemptions. Because of the applicable Statute of Limitations (two years), no case filed today can relate back prior to 1994. Portal-to-Portal Act of 1947, 61 Stat. 84, as amended 29 U.S.C. § 255(a). Since the City amended its rules in 1993 to comply with the salary basis test, no new cases could have been brought after September, 1995. The issue is therefore undeserving of the Court's attention.

In the following pages we will demonstrate that the City's Petition raises no legitimate constitutional issues or important federal statutory issues, and that there is no real conflict among the courts of appeals on the "subject to" question warranting this Court's intervention.

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[10] See fn. 15, p. 19 below.

II

THE PERCEIVED CONFLICT AMONG THE CIRCUITS ON THE SUBJECT TO/ACTUAL DEDUCTION ISSUE IS MORE APPARENT THAN REAL. IN ANY EVENT, THE EMPLOYEES IN THIS CASE HAD ACTUAL REDUCTIONS IN THEIR COMPENSATION. THEREFORE THE COURT SHOULD NOT GRANT THE WRIT.

A. *There Is No Real Conflict Among the Circuits*

The Second Circuit stated that the "issue that continues to divide the federal courts [is] [h]ow to apply in the public sector the Department of Labor's 'salary basis' test, which is used to determine whether employees are managers and consequently not covered by the wage and overtime provisions of the Fair Labor Standards Act. . ." (A 5).

Because of the precise wording of the salary basis regulation (29 C.F.R. 541.118(a)), there can be no reasonable dispute that the "subject to" standard is the most faithful interpretation and the only one that makes any sense. Any other interpretation would be unworkable and impractical, because of the uncertainty that would exist as to how to apply the test. *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), demonstrates why a literal reading of the salary basis regulation is essential. There, the Court stated:

> Subjecting an employee's pay to deductions ...is completely antithetical to the concept of a salaried employee. A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed. It is precisely because executives are thought not to punch a time clock that the salary test for "bona fide executives" [and administrative and professional employees] requires that an employee's predetermined pay not be "subject to reduction

> because of variations in the . . . quantity of work performed"

A close examination of the Courts of Appeals' decisions in this area reveal that there is more consensus and less of a conflict than might appear at first glance. The Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth and D.C. Circuits, all look to see if there is an actual policy subjecting salaried employees to deductions. *See*, for example, *Yourman v. Dinkins*, 84 F.3d 655, (2d Cir. 1996), *pet. for cert. filed*, __ U.S.L.W. (1996), No. 96-152; *Martin v. Malcolm Pirnie*, 949 F.2d 611, 615 (2d Cir. 1991), *cert denied*, 113 S.Ct. 298 (1992); *Balgowan v. State of New Jersey*, 84 F.3d 656 (3d Cir.), *vacated on other grounds*, 84 F.3d 667 (July 9, 1996); *Shockley v. Newport News*, 997 F.2d 18 (4th Cir. 1993); *Michigan Ass'n of Government Employees v. Department of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *pet. for cert. filed*, 64 U.S.L.W. 3297 (Oct. 10, 1995); *Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995); *Klein v. Rush Presbyterian*, 990 F.2d 279 (7th Cir. 1993); *McGuire v. City of Portland*, ___ F.3d ___, 1996 WL 431720 (9th Cir. 1996); *Hurley v. Oregon*, 27 F.3d 392 (9th Cir. 1994); *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991); *Carpenter v. City & County of Denver*, 82 F.3d 353 (10th Cir. 1996), *pet. for cert. filed*, 65 U.S.L.W. 3017 (June 28, 1996); *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993). While in the Sixth and Ninth Circuits, the courts of appeals will look to the presence of actual deductions if there is any uncertainty or ambiguity in the employer policy, actual deductions are not otherwise needed in the above jurisdictions, except to illustrate that the policy exists.

Although the Eleventh Circuit has held that pay is not "subject to reduction" where there is no evidence of employees ever suffering reductions in pay, (*Atlanta Professional Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991)), the circuit has subsequently made clear what evidence it needs to deny the exemption. Thus, one impermissible disciplinary deduction pursuant to an express

employer policy is enough to make the entire subject class of employees, non-exempt. *Avery v. City of Talladega*, 24 F.3d 1337, 1342 (11th Cir. 1994). Although the City lists in its Petition the Fifth Circuit as a circuit requiring actual deductions, that court simply "recognized that it had no evidence before it of either actual deductions *or* a policy of docking pay." (A 20). *York v. City of Wichita Falls*, Tex., 944 F.2d. 236, 242 (5th Cir. 1991).

In the Eighth Circuit, a public sector employer that expressly subjects its salaried employees to impermissible deductions, does not lose the § 13(a)(1) exemption, despite the unambiguous language of 29 C.F.R. 541.118(a). *Auer v. Robbins*, 65 F.3d at 702, 710-711 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (June 24, 1996); *McDonnell v. City of Omaha*, 999 F.2d 293, 296 (8th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994). The Eighth Circuit is apparently unwilling to apply the salary basis test to the *public* sector at all. Instead, by judicial fiat, it has invented conditions relating to the salary basis test which, in effect, bestow on public employers an impenetrable § 13(a)(1) exemption and which leave the public employees in that Circuit without a claim when it comes to overtime compensation.

This, of course, is contrary to this Court's holdings that exemptions under the Act are to be strictly and narrowly construed and that employers have a heavy burden to satisfy their claim for the exemption. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy and Assoc.*, 358 U.S. 207, 211 (1959); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97, (1974).

Although there was an actual deduction in *Auer*, the Court of Appeals did not find a loss of exemption because it found the circumstances unique and not pursuant to established policy. *Auer*, at 710-711. In this case we have no unique circumstances and an established policy. Therefore, whatever determination the Court makes in *Auer* will not impact on the decision in this case. Accordingly, the Court should not delay denial of the Petition pending a decision in *Auer*.

B. *There Were Actual Deductions in this Case*

Although there are actual deductions in this case, the District Court stated that its "holding does not depend upon the occurrence of any actual deduction in compensation." (A 14). Thus, the employees in this case are not dependent on a finding that a policy without actuals is insufficient to cause the loss of the exemption. This case differs from *Auer* in at least two important respects. Here, there was an express policy and the disciplinary deductions were not made under unique circumstances but directly pursuant to the City's policy.

To the extent that the City implies that there was only one impermissible disciplinary deduction in the class of managers subject to the disciplinary policy, it is misleading this Court. The City has chosen to exclude plaintiffs who were reimbursed or received their ultimate penalty as a result of the settlement of disciplinary charges. Further, the City ignores similarly situated managers who received disciplinary penalties but did not opt-in as plaintiffs in this case. The fact of their actual discipline and actual deduction is no less real than any other actual deduction. The City's history is that discipline is not merely theoretical. Since the City admitted that the whole class of managers were subject to penalties that would violate the salary basis test, the exact amount of disciplinary penalties is not relevant and were not fully tallied up.[11] *See McGuire, supra* ___F.3d. ___, 1996 WL 431720 at

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[11] The record shows that in a small agency such as the Fire Department, during the period 1989 through 1991 alone, there were six disciplinary cases of civilian managers, and in three cases, the penalty was docking of pay (JA 243-248). Another small agency, Housing Preservation and Development, disciplined three managers between 1989 and 1991, two of whom were fined and one lost five days annual leave (JA 250). In the Human Resources Administration, at least five managerial employees were disciplined during the period 1989-92. Three were demoted, one had charges pending for AWOL and the fifth was reprimanded (JA 252). In the Department of Sanitation, a uniformed manager was suspended for four days in 1991 for violation of sick leave policy. Another was disciplined in 1986 for failure to report to the clinic when ordered. A third was brought up on charges and received a reprimand, although under

(Footnote continued)

p.1, (awarding judgment to plaintiffs while noting that "[n]o battalion chief has ever suffered such a reduction, but other city employees subject to the policy have been suspended without pay for disciplinary reasons.")

The City had express policies in three areas that could, and in some cases, did lead to impermissible deductions. These policies, if not individually, then certainly in the aggregate, give every indication that the managerial employees are in fact non-exempt and offer no hint to the contrary.

The City, on page 36 of the Petition, makes much of the Solicitor General's *amicus* brief, which was submitted in *Auer* on behalf of the DOL and in opposition to the *certiorari* petition. Aside from the lack of appropriateness of citing as authority an *amicus* brief filed in another case which was factually very different from this case, the DOL's position in that brief is murky at best but in any event provides little help to the City's case. Deductions are not theoretical in this case. All have been intentionally imposed and the entire class of managerial employees was subject to these deductions in the same way that hourly non-exempt City employees are subject to deductions under similar policies. The deductions involved in this case can hardly be called "isolated" or "occur[ing] only under unusual circumstances" (Pet. 36). The deductions in this case occurred because the City had express policies permitting the deductions.

To the extent that the DOL was attempting in *Auer* to make a change in interpretation of its own rules without the benefit of the rulemaking process, it has achieved little in the way of clarity. Moreover, an *amicus* brief which runs contrary to the

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command discipline the agency had sought a one to three day suspension without pay (JA 456,239). Deposition witnesses indicated they knew of other instances of discipline for managers (JA 239, 382-84, 393, 424-26, 468).

wording of DOL's own regulations and previous letter rulings[12] cannot substitute for rulemaking.

In sum, all but one of the circuits uniformly interpret the salary basis regulation consistent with its language. The sole circuit that breaks from these ranks - the Eighth - is having its case reviewed by this Court.[13]

III

THE SALARY BASIS TEST IS A VALID EXERCISE OF THE RULEMAKING AUTHORITY OF THE SECRETARY OF LABOR

A. *There is No Conflict in the Circuits*

The City asserts that this Court should address the issue of the validity of the salary basis test as applied to the public sector. However, the Second Circuit, in affirming the District Court's opinion, did not discuss the validity issue. Nor did it refer to any conflict among the circuits on the validity issue. In fact, there is no conflict worthy of the Court's attention to grant the Writ. The District Court found no evidence that the salary basis test contravened congressional intent and summarily disposed of the City's argument that the salary test was irrational and violative of the Administrative Procedure Act

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[12] "Where disciplinary deductions not permitted by the Regulations occur on a regular and recurring basis (e.g. because of an employer's policy), we would question whether such employees, including all of those in the 'class' or 'category' of employees affected by such deductions, are actually paid on a salary basis and the exemption may be denied in *all* workweeks." U.S. Department of Labor, Wage and Hour Division, Letter Ruling of December 24, 1991 (RA 5); "...[W]e wish to emphasize that disciplinary deductions ... are permissible *only* for the reasons cited in [the Letter Ruling of December 24, 1991]. . . We continue to believe that employees may be appropriately disciplined in other ways." U.S. Department of Labor, Wage and Hour Division, Letter Ruling of March 30, 1994. (RA 4)

[13] The suggestion (Pet. 37) that the window of correction would be available to the City in this case was not raised or argued before the District Court.

("APA") 5 U.S.C. § 551 *et seq.* characterizing their argument as "greatly confused". In fact, the District Court saw the City's presentation, not as an APA or validity argument at all, but as "a restatement of their contention . . .that 'subject to reduction' under § 541.118(a) should be interpreted to require actual deductions from employee compensation", an argument that the District Court had already discussed and rejected (A 25-26).

Since the Department of Labor amended the salary basis test in September 1991, by eliminating the prohibition against part-day docking only in the public sector, no courts of appeals have found the revised salary test to be invalid. Thus, there is no conflict at all concerning the revised salary regulation.

Furthermore, although two circuits, the Third and Ninth, found the entire pre-September 1991 salary basis test to be invalid as applied to the public sector, the only real concern that these courts had with the *old* salary test was the part-day docking component, which is not at issue here. *See, Balgowan v. State of New Jersey*, 84 F.3d 656 (3d Cir.), *vacated on other grounds*, 84 F.3d 667 (July 9, 1996); *Service Employees International Union ("SEIU"), Local 102, et al. v. County of San Diego*, 60 F.3d 1346, 1353 (9th Cir. 1994) (Order, Supp. Opinion 1995), *cert. denied*, 64 U.S.L.W. 3479, 3484 (1996) ("[t]he 1992 regulation properly amends the salary test as applied to the public sector, so that the salary test now takes into account long-standing and reasonable state and local ordinances predicated on public accountability."); *McGuire v. City of Portland*, ___ F.3d ___, 1996 WL 431720 at p. 3 (9th Cir. 1996) (directly addressing the validity of the disciplinary component and explicitly finding it and the entire revised salary basis test valid).

In sum, no courts of appeals have held that any component of the salary basis test, other than the part-day docking component, is invalid on account of public accountability principles, progressive discipline principles or anything else.

B. *The Disciplinary Component Does Not Contravene Public Accountability Or Progressive Discipline Principles*

Contrary to the City's assertions, there is a rational basis in using the disciplinary component to determine whether an employee is employed in a bona fide executive or administrative capacity. Such employees are expected to work all hours that are necessary to perform their tasks. Since these individuals will not be receiving any overtime compensation for the long hours they are expected to work, the trade-off is that their salary will not be reduced because of the quantity and quality of their work in weeks in which they perform work.

There is nothing irrational about a salaried employee, who is expected to work long hours or as many hours as are necessary, not being subject to pay deductions because she has to testify for a few days in court, be called for military duty in the middle of a week or is suspended for a minor disciplinary infraction. Unlike hourly employees, salaried employees get paid by the week. If they do not get their full pay, they are simply not salaried. *See*, *Abshire v. County of Kern*, 908 F.2d at 486 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 785 (1991); *Martin v. Malcolm Pirnie*, 949 F.2d at 615. Indeed, the lead plaintiff in this case, supposedly a salaried managerial employee, had $6.25 deducted from his salary for overstaying his lunch hour on one day. (JA 212-216, 484).

The City's Statement of the Case is misleading in its presentation of how the disciplinary, military leave and court attendance components of the salary basis test impact uniquely on public employers (Pet. 13-15). The City argues that despite the elimination of the part-day docking component of the salary basis test, the various remaining components are irrational and thus violative of the APA (Pet. 19-24). The salary basis test has existed for more than 50 years. It has periodically been revised by DOL, most recently in 1992. 29 C.F.R.§ 541.5d. While there may be other acceptable ways to define a truly salaried employees, the DOL's definition has stood the test of time and the City is unable to state any persuasive

reasons why this Court should make second class citizens out of public employees.

The City cites no authority for the proposition that public accountability principles are implicated by a prohibition on fines of exempt employees or suspensions for less than one week periods. Public accountability is rooted in the notion "that governmental employees should not be paid for time not worked, and that there is need to be accountable to the taxpayers for the expenditure of public funds." 56 Fed.Reg. at 45825. Since employees who are subject to disciplinary deductions are not paid while not working, no issue of public accountability is presented.

The City criticizes as absurd or irrational those court decisions that have found one deduction for a disciplinary infraction to be sufficient for an employer to lose its exemption for all similarly situated employees. (Pet. 35-36). The City suggests that only the offending employee should lose the exemption and then only for that week.(Pet. 37)[14] That makes no sense at all. If an employee is disciplined with a three day suspension, is there a chance he will work more than 40 hours that week or that the employer will give him sufficient overtime to make up for his suspension? Of course not.

There is nothing problematical about applying the disciplinary element of the salary basis test to public employees. *McGuire*, *supra*, 1996 WL 431720 at p. 3, ("the city has provided no sound basis for its claim that public accountability requires it to have more liberal disciplinary powers than private employers"). In *Mueller v. Reich*, *supra*, 54 F.3d at 442-43, the court upheld the application of the revised salary basis test to public employees, ruling that the public employer's articulated policy of imposing unpaid suspensions was inconsistent with §541.118(a)(5). The court found that the entire

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[14] No court of appeals has ruled that this is the appropriate remedy for violation of the salary basis test.

plaintiff class was entitled to overtime compensation in accordance with the mandates of the FLSA.

Furthermore, the principle of progressive discipline is not compromised. Nor is that principle unique to the public sector. On the contrary, the principle is derived from the concept of "just cause" for disciplinary action, which in turn is derived from the private sector. *See* Elkouri and Elkouri, *How Arbitration Works*, Ch. 15, (4th ed. 1985). The disciplinary component of the salary basis test neither deprives the City of the § 13(a)(1) exemption nor compels it to discipline its employees in any particular way. The New York cases cited by the City, (Pet. 14), merely hold that termination of a civil service employee can be too excessive a penalty in specific circumstances. They impose no disciplinary structure requiring deductions from pay or suspensions of less than a week.

As the City acknowledges, (Pet. 23-24), when the DOL eliminated the part-day docking component of the salary basis test for public employers in 1991-92, it refused to eliminate the other components, finding that the public accountability concerns underlying the part-day docking changes were not present in the other aspects of the salary basis test. The DOL considered comments by public employers that urged that the salary basis test be eliminated altogether for public employees. The comments were similar to those made here by the City. The DOL found that there was insufficient basis to distinguish between the private and public sectors in this area and that the commenters failed to demonstrate that public employers are significantly more restricted than private employers in the availability of options with respect to employee discipline, since termination, reprimands, demotions and reassignment are all generally available. 57 Fed. Reg. at 37674. In addition, the DOL has ruled that deductions of one day or more from accrued leave would not violate the test. Letter Ruling of March 30, 1994 (RA-4).

DOL also rejected the suggestion that §541.118(a)(6) be amended to provide that the exemption is lost only in the week that the improper deduction occurred, finding that the

suggested change would be a significant departure from long-standing policy. 57 Fed. Reg. at 37675.

Many employers, including the City, have modified their policies to satisfy the test.[15] From September 15, 1993 to the present, the City has been able to claim the §13(a)(1) exemption without adverse consequences. While the City continues to question the rule's rationality, one thing is clear: "public accountability" and "progressive discipline" principles have not been eroded.

C. *The Salary Basis Test Does Not Contravene Congressional Intent*

The City contends that because the salary basis test was promulgated initially with the private sector in mind, years before the FLSA even applied to the public sector, the salary test should not apply to the public sector. The City claims the salary basis test thwarts congressional intent. (Pet. 20). However, Congress has not expressed an intention that the salary test not apply in the public sector. Neither the original Act, nor any subsequent amendment, nor the legislative history suggests that the test should be applied any differently to public employees.

The City relies on one ambiguous piece of legislative history in arguing that the salary test as applied to public employees conflicted with legislative intent, i.e., the language in the House Report on the 1974 amendments to the FLSA stating, "the bill extends minimum wage and overtime protection coverage to about 5 million *non-supervisory* employees in the public sector." (H.R. Rep. No. 913, 93rd Cong., 2d Sess.

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[15] For example, on October 9, 1990, March 29, 1991 and June 27, 1991, respectively, the Fort Worth Fire Department (*Simmons v. Fort Worth*, 805 F.Supp. 419, 422 (N.D., Texas 1992)), New York City Transit Authority (JA, 889, 939) and the State of Nevada (*Benzler v. State of Nevada*, 804 F.Supp. 1303 (D.Nev. 1992)) changed their rules, so as to prohibit part-day docking of FLSA-exempt employees.

(1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2837) (emphasis added).

However, by extending FLSA coverage to "non-supervisory employees in the public sector, Congress was extending the §13 (a)(1) exemptions to public employers so that the provisions of the Act would be administered "in such manner as to insure consistency with the meaning, scope, and application established by the rulings, regulations interpretations, and opinions of the Secretary of Labor which are applicable in other sectors of the economy." H.R. Rep. No. 913, *supra*. Thus, the Secretary's choice, following the 1974 Amendments, to apply the "salary basis" regulation at 29 C.F.R. 541.118, as it existed, to public employees was reasonable, not inconsistent with congressional intent and a "permissible construction." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 843.(1984).[16]

D. *The Secretary's Regulations Relating to the Section 13(a)(1) Exemption Should be Accorded Great Deference as they are a Permissible Construction of the Statute*

The City, in the alternative, asks this Court to grant the Writ to answer its question as to whether the salary basis test is a legislative regulation or an interpretation (Pet. 25). But there is no question that the salary basis test is a regulation. No court of appeals has held otherwise.

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[16] The House Report on the 1985 amendments states that Congress recognized that it was "essential that the particular needs and circumstances of the states and their political subdivisions be carefully weighed and accommodated." H.R. Rep. No. 99-331, 99th Cong., 1st Sess. 17 (1985). These amendments accommodated public employers in several respects. For example, Congress allowed public police and fire departments to place employees on shifts of longer than 40 hours per week without paying them at the statutory overtime rate and also allowed all public employers to substitute compensatory time for cash overtime compensation. *See* 29 U.S.C. § 207(k), (o). Changing the salary basis test was not one of the accommodations that Congress found to be necessary then at or any subsequent time.

Section 13(a)(1) of the FLSA provides an exemption from the Act's overtime provisions to "any employee employed in a bona fide executive, administrative, or professional capacity...(*as such terms are defined and delimited from time to time by regulations of the Secretary*, subject to the provisions of the Administrative Procedure Act ...)." 29 U.S.C. §213(a)(1) (emphasis added). Congress thus specifically and expressly authorized and empowered the Secretary of Labor to "define and delimit" the contours of the § 13 (a)(1) exemption.

In 1940, the salary basis test was initially promulgated. 5 Fed. Reg. 4077. In 1949, the DOL amended the regulation to specify precisely what it meant to be paid on a salary basis. 14 Fed. Reg. 7730, 7735 (1949) and in 1954, the DOL further elaborated the test. 19 Fed. Reg. 4405, 4406 (1954). *See also* 19 Fed. Reg. 1321 (1954).

In 1992, after conforming to the APA requirements, the Secretary revised the test to fully take into account the principle of public accountability. By modifying its regulations from time to time, the Secretary of Labor has recognized the need for agency flexibility and its role to resolve "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities" *Chevron, supra*, 467 U.S. at 865-66.

As this Court has held "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the Statute by regulation." *Chevron, supra*, 467 U.S. at 843-44. "In a situation of this kind, Congress entrusts to the Secretary, rather than the courts, the primary responsibility for interpreting the statutory term." *Batterton v. Francis*, 432 U.S. 416, 425 (1977). The courts must give legislative regulations "controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute." *Chevron* 467 U.S. at 843-44.

This Court has held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*. at 843. *Chevron* thus recognizes that administrative agencies are the proper bodies to address complex policy issues within their area of expertise when Congress has not spoken to those issues.

Unlike this case, *Skidmore v. Swift & Co*, 323 U.S. 134, 140 (1944), relied on by the City, did not involve an agency regulation adopted through the rulemaking process and pursuant to express congressional delegation. Rather, it involved a bulletin and some informal rulings drafted in the absence of congressional delegation of authority to define the terms in dispute.[17]

In view of the fact that Congress expressly delegated authority to the Secretary to define the § 13(a)(1) exemption, this Court, if it addresses the issue at all, should treat the Secretary's exercise of that authority with the highest deference. *Avery supra*, 24 F.3d at 1340; (according deference to the disciplinary component of the salary basis test); *Mueller supra*, 54 F.3d at 442 (holding that the salary basis test as amended by § 541.5d was promulgated pursuant to express congressional delegation, and therefore, need only be rationally related to the objectives of the FLSA).

As to the City's reliance on *Freeman v. National Broadcasting Company, Inc.*, 80 F.3d 78 (2d Cir. 1996), suffice it is to say that *Freeman* is not even a salary basis case.

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[17] The fact that the salary basis regulation was misplaced in the interpretation section of the Code of Federal Regulations does not turn it into an interpretation since it was adopted pursuant to regulatory authority and procedure.

E. *The Failure of Congress to Amend the Salary Basis Test is an Indication of Congressional Intent*

It is well settled that "[w]here 'an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982). "In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive that the interpretation is the one intended by Congress." *See, NLRB v. Bell Aerospace Company*, 416 U.S. 267, 274-275 (1974).

Furthermore, "it is appropriate to attribute significance to [congressional] inaction where an administrative interpretation 'involves issues of considerable public controversy,' ...and Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter." *Guardians Association of the New York City Police Department v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983).

In amending the Act in 1966, 1974 and 1985 to apply to the public sector, Congress did not alter the regulations applying the exemption provisions contained in § 13(a)(1).[18] Nor did Congress direct the Secretary of Labor to adopt new regulations making special provisions for the application of § 13(a)(1) to state and local government employees. Given the fact that Congress has amended the Act several times and has not changed the long-standing salary basis regulation and there has been considerable public controversy regarding the regulation, including issues raised by petitioners themselves,

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[18] 80 Stat. 83 (1966); 88 Stat. 55 (1974); 99 Stat. 787 (1985).

the only reasonable inference to draw is that the DOL's interpretation is the one intended by Congress.[19]

In short, the acceptance of the City's position regarding validity would require the Court to turn principles of statutory construction on its head in order to nullify a well-established regulation that Congress has never renounced. Further, such acceptance would undermine the deference due to the Secretary's express authorization to promulgate reasonable regulations to carry out the intent of Congress.

IV

THE TENTH AMENDMENT IS NOT IMPLICATED IN THIS CASE

Despite this Court's definitive holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) laying to rest the question of whether the Tenth Amendment limited the power of Congress to extend the Fair Labor Standards Act to state and local governments, and despite the fact that no court of appeals has found that the Tenth Amendment restricts the application of the FLSA or its salary basis test to state and local governments, the City urges this Court to revisit *Garcia*, or at least to interpret *Garcia* so as to allow a "political effectiveness" test to determine whether the DOL regulation should be applied. However, this Court is extremely reluctant to involve itself in areas where the political process operates within the constitutional framework. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Rodriguez v. United States*, 480 U.S. 522 (1987).

In *Chevron* and *Rodriguez* this Court held that it is Congress and the executive branch and not the courts that may chose between competing policies, compromising one to

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[19] In 1989, 1990, and 1993, Congress again amended the FLSA. 103 Stat. 938 (1989); 104 Stat. 2871 (1990); 107 Stat. 6 (1993). It once again made no modifications of §13(a)(1) or the Secretary's "salary basis" regulations.

advance another. "[D]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez*, 480 U.S. at 525. The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. "Our Constitution vests such responsibilities in the political branches." *Chevron*, 467 U.S. at 866.

In *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) this Court held that "Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation." The City claims that such extraordinary defects in the political process are present here. The District Court found otherwise, stating (A24-25):

> I perceive absolutely no basis in this matter for finding 'extraordinary defects in the national political process' under *Garcia-Baker* despite defendants' assertion that 'the political process has broken down'... To the extent that defendants complain about the political process, they focus upon the damages they face in this action - which they view as an undue burden and a result of failures in the political system - without pointing to any substantive defect in the political process itself.

But, as the lower court found, "the political process has operated proficiently despite the enduring existence of defendants' exposure to liability under the FLSA. Indeed the existence of §541.5d and the redemption it affords in this very action to defendants' part-day docking policies provides concrete proof of the vitality of the political process." (A 24-25)

The City's reliance on *Gregory v. Ashcroft* 501 U.S. 452 (1991) is also misplaced. (Pet. 22-33). As the Court of Appeals stated in *Reich v. State of New York* 3 F. 3d 58 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994) "[N]othing in

Gregory resurrects the substantive Tenth Amendment limitations interred by *Garcia*." In *Reich*, the Court found that the award of overtime pay to criminal investigators was "not so intrusive as to strike at 'the heart of representative government.'" 3 F. 3d at 589-90.

Through the political process the City, along with other state and local public employers, successfully obtained revisions of the DOL regulations to eliminate part-day docking. Section 541.5d was promulgated as an Interim Final Rule on September 6, 1991 and as a final rule on August 19, 1992. The discussion in 57 Fed. Reg. 37674, *et seq.* shows the active participation of the City in the rulemaking process.[20] In 1985, following the Supreme Court's decision in *Garcia*, state and local governments secured amendments to the FLSA which significantly limited their expenditures for overtime pay by allowing for compensatory time and providing for a higher number of hours in the workweek for police and fire employees before overtime pay was required. 57 Fed. Reg. 37667.

When the 1991-2 revisions to the salary basis test failed to eliminate the entire test, New York City actively supported legislation eliminating the salary basis test by writing to members of Congress, testifying (in the person of the Corporation Counsel) before the House sub-committee considering such legislation and taking other political action. (JA 271-87, 1109-10).

The City complains about the slowness of DOL's response to their perceived problems in the salary basis test's application to the public sector. The DOL's rulemaking in 1991-92 may not have been quick enough to satisfy the City and other public employers. The DOL's failure to make further accommodation to the perceived needs of the City by eliminating

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[20] Moreover, New York City, like other state and local employers had an opportunity to and did comment in 1985 on proposed rulemaking concerning the salary basis test. When asked whether the test should be eliminated, New York's Labor Relations Director said "no". (JA 255, 935)

the salary basis test altogether is a grave disappointment to the City. On the other hand, the DOL's action in 1991-92 was a blow to white-collar employees who work long hours[21] and expected that after *Garcia* and the 1985 FLSA amendments that they would be treated like their counterparts in the private sector. DOL's unwillingness to make further distinctions between the public and private sectors is in our view, faithful to those amendments.

The City also claims that the "denial of the managerial exemption" intrudes on states' rights. (Pet. 27) But there is no denial of the managerial exemption. Defendants have availed themselves of the managerial exemption since September, 1993, because they did what all employers should do - they obeyed the law. Nor is it true, as the City claims, that it is prevented from withholding pay or reducing salaries of their employees. It simply must do so in ways not violative of the salary basis test.

Finally, the City claims that decision-making has been shifted from Congress to regulatory agencies whose officials are not directly accountable to the electorate. But Congress has repeatedly amended the FLSA, four times since *Garcia*.[22] If Congress had considered the requests by public employers to eliminate the salary basis test as to public employees to be worthy of enactment, it obviously would have done so. The City now seeks to have this Court legislate where Congress has consistently refused to do so.

In the meantime, while this case was pending in the lower court, the defendants declined to limit their liability which they could have done easily by changing their rules. It was not until September and October, 1993 that the three defendant agencies revised their rules in accordance with the District

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[21] The FLSA was designed to protect employees from "the evil of 'overwork', as well as 'underpay'." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 739 (1981).

[22] See fns. 18 and 19, pp. 23-24 above.

Court's decision. (RA 1-2). These changes put the defendants in compliance with the salary basis test and no additional liability has been incurred since then. Significantly, the City does not discuss these changes in cataloguing all the drastic consequences that will result from the application of the remaining portions of the salary basis test. Nor does it cite any actual instances in which the inability of the defendants to deduct from managers' pay checks for absences of less than a full week due to disciplinary penalties, court attendance or military leave has interfered with their ability to appropriately discipline employees or otherwise conduct their governmental functions in accordance with their sovereign interests.

The political process is still alive and well. Indeed, the City has achieved to date a large measure of success in utilizing the various available political remedies. The fact that it has not achieved complete success by eliminating past liability or changing the remaining portions of the salary basis test does not signify a breakdown in the political process. It simply means that in politics you do not always win.

The terrible consequences envisaged by the City are not grounded in reality. As this Court said in *Garcia* (469 U.S. at 556), quoting from Justice Frankfurter in *New York v. United States*, "The process of constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world..." 326 U.S. 572, 583 (1946).

CONCLUSION

For the above reasons, the Petition should be denied. Nor is there any reason to delay denial of the Petition pending this Court's resolution of the *Auer* case. There is no genuine issue in this case that could be affected by *Auer*.

Respectfully submitted,

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ROBERT N. FELIX
Of Counsel

August 23, 1996

APPENDIX

APPENDIX

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK

MEMORANDUM

TO: Agency Heads

FROM: Herman L. Jenkins City Personnel Director

SUBJECT: "Leave Regulations for Management Employees" and Other Related Regulations and Policies Affecting Civilian and Uniformed Managers

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This is to inform you of certain changes in Personnel Order No. 88/5, the "Leave Regulations for Management Employees", and other applicable regulations and policies affecting civilian and uniformed managers that are being made so that the City will be in conformance with the requirements for exemption from the overtime provisions of the Fair Labor Standards Act cited by United States District Judge Loretta A. Preska in her July 12, 1993 decision in *Yourman et al. v. Dinkins et al.* (Fair Labor Standards Act Applicability to Managers who Work in Excess of 40 Hours per Week). These changes are effective immediately. Amendments to Personnel Order No. 88/5 and other regulations and policies will be issued shortly.

Please see that your Personnel, Payroll and Timekeeping divisions are made aware of the following changes:

- Except for an infraction of a safety rule of major significance which creates a serious danger to the work site or to other employees, the following disciplinary penalties are prohibited: docking of pay; docking of annual leave; suspension without pay and fines. In addition, managerial lump sum payments may not be docked for misconduct.

- A manager's pay may not be docked in connection with a 30-day suspension prior to resolution of disciplinary charges.

- A manager's pay may not be docked for temporary military leave, regardless of the length of the leave. However, if during a calendar year, a manager's military leave exceeds, in the aggregate, 30 calendar days or 22 working days, whichever is greater, then for the excess number of days, the manager must remit to the City an amount equal to the amount received in military pay for these excess days, provided, however, that in no case may the manager be required to remit to the City an amount greater than the amount of the manager's salary for these excess days.

- A manager's pay may not be docked for attendance as a witness at any deposition, examination before trial, grand jury proceeding, court hearing or trial, or hearing or investigation before an administrative agency or legislative body. However, to be eligible for this paid leave, the manager must remit to the City an amount equal to the amount received for such attendance as a witness, less any amount received as reimbursement for travel expenses, provided, however, that in no case may the manager be required to remit to the City an amount in excess of the amount of the manager's salary for the period of such leave with pay. In addition, the manager must submit satisfactory evidence of actual attendance as a witness. Examples of satisfactory evidence include a letter from the attorney or party who called the manager, stating that the manager was called as a witness in the matter and did actually appear on the specified date(s) and, if issued in the matter, one of the following: a subpoena; court or administrative order; notice of deposition; or notice of examination before trial.

- A manager's unexcused tardiness, both upon arrival at work and upon return from a meal break, shall be charged to the manager's accrued leave balances. Only if the manager's accrued annual leave balances are exhausted may his or her pay be docked for unexcused tardiness, and then pay may be docked only to offset the

actual amount of time missed through unexcused tardiness.

- A manager who has negative leave balances when he or she leaves City service may not have his or her pay or managerial lump sum payment docked to offset the negative leave balances.

If you have any questions regarding the above changes, please call Andrea Wrubel, Director of Special Programs, at (212) 487-5736.

cc: Personnel and Budget Officers

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

Letter Ruling of March 30, 1994

This is in response to your inquiry concerning the application of §541.118 of 29 CFR 541 to employees who may be suspended without pay for disciplinary purposes. We regret the delay in formally responding to your inquiry.

As you know, a copy of our December 24, 1991, letter to the National Association of State Personnel Executives concerning this issue was previously furnished to___of your office. We will not restate it here. However, we wish to emphasize that disciplinary deductions from the salaries of otherwise exempt employees are permissible *only* for the reasons cited in that letter. Thus, employees may not be suspended without pay for a day or more where the reason is something other than serious safety violations. Under the general rule in 29 CFR §541.118(a). however, an employee need not be paid for any workweek in which he or she performs no work (for whatever reason). We hope this will clear up the confusion on this issue. [Emphasis in original]

We continue to believe that employees maybe appropriately disciplined in other ways. For example, it would appear that reducing accrued leave entitlement by a day or days for the infraction could achieve the desire disciplinary goal. In our view such a practice would not affect the salary basis of payment describe in 29 CFR §541.118, or otherwise adversely affect the application of §13(a)(1).

We trust that the above is responsive to your inquiry.

[Opinion signed by Wage Hour Administrator Marie Echaveste, March 30, 1994.]

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

Letter Ruling of December 24, 1991

You will recall that at your____ meeting last summer, I promised to provide your organization with an explanation of the effect of disciplinary deductions under Regulations, 29 CFR Part 541. I regret the delay in providing this information but think that you will still find it useful.

As I explained in my remarks, the only deductions which may be made from an employee's compensation without affecting the "salary basis' of payment are found in §§ 541.118(a)(2), (3), and (5) of the Regulations (copy enclosed). The only discipline-related deduction permissible is one imposed as a penalty "in good faith for infractions of safety rules of major significance." As explained in §541.118(a)(5), safety rules of major significance embrace those intended to prevent serious danger to the facility or other employees, including prohibitions against smoking in explosive plants, oil refineries and coal mines. The Department of Labor has also construed this language to cover penalties imposed for violations of industrial security regulations promulgated by the Department of Defense.

The effect of making impermissible disciplinary deductions from "salaried" employees is discussed in §541.118(6). Where a one-time disciplinary deduction is made, the exemption will not be considered to have been lost in all workweeks *if* the employer reimburses the employee for such deduction *and* agrees to not take any such impermissible deductions in the future. Where disciplinary deductions not permitted by the Regulations occur on a regular basis (e.g. because of an employer's policy) we would question whether such employees, including all of those in the "class" or "category" of employees affected by such deductions, are actually paid on a salary basis and the exemption may be denied in *all* workweeks. [Emphasis in original]

I would again emphasize that these rules are not intended, and should certainly not be construed, to prevent employers from taking appropriate disciplinary action with respect to their employees. Rather these rules effect a long-standing interpretation of employment practices that typically distinguish those employees who are paid "on a salary basis" from those who are not. That is to say those employees who are paid "on a salary basis" are not generally subject to disciplinary action that results in deductions from their salary, but are and can be appropriately disciplined in other ways.

I trust that the above discussion fulfills my commitment. Please let me know if you have any further questions in this matter.

[Opinion signed by the Acting Wage Hour Administrator John R. Fraser, December 24, 1991.]